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10 **UNITED STATES DISTRICT COURT OF**
11 **EASTERN DISTRICT OF WASHINGTON**

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13 CONFEDERATED TRIBES AND
14 BANDS OF THE YAKAMA
15 NATION,

Plaintiff,

16 v.

17 KLINKITAT COUNTY;
18 KLINKITAT COUNTY SHERIFF'S
19 OFFICE; BOB SONGER;
20 KLINKITAT COUNTY
21 DEPARTMENT OF THE
22 PROSECUTING ATTORNEY; and
23 DAVID QUESNEL

Defendants.

NO. 1:18-CV-03110-TOR

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Defendants have jurisdiction to enforce State of Washington fireworks laws against Yakama Nation members on trust allotments outside of the Yakama Reservation. The Washington State Legislature's amendment to the fireworks chapter to label it as "regulatory" in nature did not change the prohibitory nature of the specific statutes that gave rise to this case, and thus they remain subject to state jurisdiction under Pub. L. 83-280. Even if the Washington fireworks laws were deemed to be civil/regulatory for purposes of Public Law 83-280 and RCW 37.12, the state would still have authority to enforce the statutes at issue here under the circumstances of this case. Under United States Supreme Court precedent the state has inherent authority to regulate tribal members' conduct within Indian country that has significant impacts outside Indian country, such as the sale of dangerous fireworks to non-Indians from off-reservation Yakama trust allotments in Klickitat County. For these reasons Plaintiff's motion for summary judgment should be denied.

II. STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317 (1986); Fed. R. Civ. P. 56(a). If the non-movant is entitled to judgment as a matter of law, the court may grant summary judgment to the non-movant. Fed. R. Civ. P. 56(f).

III. Argument

A. Plaintiff Is Not Entitled To Judgment As A Matter Of Law.

1 **1. The legislature has maintained the prohibitory nature of the fireworks**
2 **statutes that gave rise to this case.**

3 Plaintiff offers an overly simplistic view of Washington fireworks
4 statutes and relevant case law. According to Plaintiff, the following statement
5 by the legislature makes all of RCW 70.77 *per se* “civil/regulatory” for
6 purposes of Public Law 280:

7 The legislature declares that fireworks, when purchased and used
8 in compliance with the laws of the state of Washington, are legal.
9 The legislature intends that this chapter is regulatory only, and
not prohibitory.

10 1995 Wash. Sess. Laws p. 239, ch. 61, § 1 (codified at RCW 70.77.111). But
11 the cases Plaintiff cites show that the legislature’s label is not the end of the
12 inquiry. Instead, “The applicable state laws governing an activity must be
13 examined in detail before they can be characterized as regulatory or
14 prohibitory.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202,
15 211 n.10 (1986). The inquiry is “one of the statute’s intent and not simply its
16 label.” *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1992)
17 (California law prohibiting sale of dangerous fireworks was
18 criminal/prohibitory despite its codification as a civil enactment). In
19 Washington, “[d]eclarations of intent,” such as the one in RCW 70.77.111,
20 “are not controlling,” though they may provide guidance. *State v. Reis*, 183
21 Wn.2d 197, 212 (2015). They do not control this Court’s analysis because the
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1 “characterization of a state law as ‘criminal’ or ‘civil’ for purposes of [Public
2 Law 280] is a question of federal law.” *Burgess v. Watters*, 467 F.3d 676, 684
3 (7th Cir. 2006). The court must focus on “the specific statute at issue,” not the
4 “larger regulatory scheme” in which it is found. *United States v. Dotson*, 615
5 F.3d 1162, 1168-69 (9th Cir. 2010) (prohibition against furnishing alcohol to
6 minor was prohibitory). To determine whether a statute is
7 criminal/prohibitory, “The shorthand test is whether the conduct at issue
8 violates the State’s public policy.” *Cabazon*, 480 U.S. at 209; *see Dotson*, 615
9 F.3d at 1169-70.

11 The specific statutes that gave rise to this case are RCW 70.77.401,
12 .540, .435, .515, and .395. ECF No. 21-1 at 15; ECF No. 3-1 at 6. A decision
13 on Plaintiff’s motion thus requires an examination of the nature of those
14 specific statutes.

16 Much like the laws at issue in *Quechan*, RCW 70.77.401 prohibits the
17 sale of certain fireworks to the public, such as sky rockets, at all times. In one
18 form or another, Washington law has prohibited retail sale of these items to
19 the general public since the 1940s. *See* 1943 Wash. Sess. Laws pp. 524 (ch.
20 161, §§ 1, 2) (prohibiting sale of “sky-rockets” and firecrackers, among other
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1 things).¹ Violation of RCW 70.77.401 is a misdemeanor under RCW
2 70.77.540. Fireworks sold in violation of RCW 70.77.401 are subject to
3 seizure under RCW 70.77.435, a quasi-criminal process. *See Boyd v. United*
4 *States*, 116 U.S. 616, 634 (1886). RCW 70.77.485 links with RCW 70.77.401
5 by making possession of prohibited fireworks a misdemeanor or gross
6 misdemeanor. The underlying policy is that “[t]he control of dangerous
7 fireworks is for the obvious protection of the public, and any violation of such
8 controlling measure is against the public policy of promoting the health and
9 safety of this state’s citizens.” *Red Devil Fireworks Co. v. Siddle*, 32
10 Wn. App. 521, 525 (1982).

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13 RCW 70.77.401 is similar to the law that was at issue in *Dotson*. In that
14 case, defendants were charged under the Assimilative Crimes Act with
15 furnishing liquor to minors in violation of RCW 66.44.270. Defendants
16 argued that Washington liquor laws are regulatory and not enforceable under
17 the ACA because they allow widespread sale and consumption of liquor under
18 state regulation. The Ninth Circuit rejected that broad approach and focused
19 on the specific statute at issue, finding it to be prohibitory because “the
20 conduct at issue—the furnishing of alcohol to minors—is flatly prohibited and
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22 ¹ Washington session laws are available on the Legislature’s website at
23 http://leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

1 criminally penalized.” *See also State v. Lasley*, 705 N.W.2d 481 (Iowa 2005)
2 (statute prohibiting sale of cigarettes to minors was criminal/prohibitory under
3 tribe-specific statute similar to Public Law 280). The same is true here. Under
4 RCW 70.77.401, the sale of certain types of fireworks is flatly prohibited and
5 criminally penalized under RCW 70.77.540. It is a prohibitory law
6 enforceable under Public Law 280 and RCW 37.12.010 and .030.
7

8 RCW 70.77.515, amended in 2002, after the “regulatory” label was
9 added, makes it a gross misdemeanor to sell fireworks without a license or to
10 persons under the age of sixteen. Persons who sell fireworks at retail must
11 obtain a license under RCW 70.77.315. Applicants for local permits must
12 demonstrate that they have liability insurance. RCW 70.77.270(3). Licensees
13 must comply with the safety conditions in WAC 212-17-21505 through
14 -21519 to maintain eligibility. *See* RCW 70.77.375. The obvious policy
15 behind these requirements is to protect the public from injury and fire hazards
16 associated with fireworks.
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18 RCW 70.77.515 is similar to the law that was at issue in *United States*
19 *v. Clark*, 195 F.3d 446 (9th Cir. 1999). In that case, defendant was charged
20 under the Assimilative Crimes Act with practicing law without a license in
21 violation of a California statute. Defendant argued that attorney licensing laws
22 are regulatory and not enforceable under the ACA because they are part of a
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1 larger regulatory scheme. The Ninth Circuit rejected that broad approach and
2 focused on the specific statute at issue, finding it to be prohibitory because it
3 protected the public from inadequate representation. *Clark*, 195 F.3d at 449-
4 50. The same is true here. RCW 70.77.515 protects the public from dangerous
5 conditions associated with the sale of fireworks. It is a prohibitory law
6 enforceable under Public Law 280 and RCW 37.12.010 and .030.
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8 Finally, RCW 70.77.395 allows the sale of fireworks only during
9 limited time periods. Violation of RCW 70.77.395 is a misdemeanor under
10 RCW 70.77.540. Again, the statute protects the public from dangerous
11 conditions associated with fireworks. It is a prohibitory law enforceable under
12 Public Law 280 and RCW 37.12.010 and .030.
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14 In *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) the court
15 addressed RCW 70.77.485, .540, and .130,² concluding “that Washington’s
16 fireworks law is a prohibitory rather than a regulatory law.” 557 F.2d at 1364;
17 see *Cabazon*, 480 U.S. at 211 n.10. The Court noted that while the
18 Washington statutes allowed for possession according to statute, the “intent is
19 to prohibit the general possession and/or sale of dangerous fireworks and is
20 not primarily a licensing law.” Since 1977, the Washington fireworks Chapter
21 has been amended, but the overall prohibitory nature of the laws here at issue
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23 ² RCW 70.77.130 was repealed in 1982.

1 remains the same. The 1995 legislation that added the “regulatory” label did
2 not repeal any of the criminal penalties in RCW 70.77 or decriminalize any of
3 its prohibitions. *See* 1995 Wash. Sess. Laws pp. 239-248 (ch. 61). That makes
4 the fireworks laws at issue in this case unlike the traffic infractions at issue in
5 *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146
6 (9th Cir. 1991). Just as in 1977, while the statutes provide for limited
7 exceptions to possess fireworks, the general intent is to prohibit the possession
8 and sale. The “regulatory” label in RCW 70.77.111 does not change the
9 fundamental prohibitory nature of the laws at issue here.

11 Plaintiff’s argument that the “regulatory” label in RCW 70.77.111
12 decides this case is similar to the one made by the defendant in *State v. Yallup*,
13 160 Wn. App. 500 (2011). In that case, defendant, a Yakama tribal member,
14 was charged with felony DUI after an accident within the Yakama
15 Reservation. He argued that, because driving is legal, driving-related laws,
16 including the state’s implied consent statute, were civil/regulatory and could
17 not be enforced against him. Applying an analysis similar to the one the Ninth
18 Circuit used in *Dotson* and *Clark*, the court rejected “the level of generality”
19 of defendant’s argument, holding that the implied consent statute had to be
20 examined on its own merits. 160 Wn. App. at 507. The court determined
21 “[t]he clear focus of the implied consent statute is gathering evidence for
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1 prosecuting criminal cases of suspected impaired driving.” *Id.* at 508. *See*
2 *also St. Germaine v. Circuit Court*, 938 F.2d 75 (7th Cir. 1991) (statute
3 prohibiting driving while license suspended was prohibitory under Public Law
4 280). Here, the clear focus of the laws that Plaintiff seeks to enjoin is to
5 prohibit the sale of fireworks except in limited circumstances, placing the
6 statutes in the criminal/prohibitory category.

8 **2. The State has full Public Law 280 jurisdiction on off-reservation**
9 **Yakama trust allotments.**

10 The State of Washington has criminal jurisdiction to the full extent
11 permitted by Public Law 280 on off-reservation Yakama trust land. Though
12 the State has retroceded some Public Law 280 jurisdiction within the Yakama
13 Reservation, it has not retroceded any jurisdiction outside the Yakama
14 reservation. *See* Governor’s Proclamation 14-01 ¶ 5 (reprinted in *State v.*
15 *Zack*, 2 Wn. App. 2d 667, 679, *review denied*, 191 Wn.2d 1011 (2018).
16 Therefore, the State has full criminal jurisdiction over off-reservation Yakama
17 trust lands per RCW 37.12.010. *See State v. Comenout*, 173 Wn.2d 235, 267
18 P.2d 355 (2011). In this case, where the statutes are prohibitory, Klickitat
19 County maintains jurisdiction to enforce the laws within the trust land in
20 question.
21

22 **3. Even if the law were deemed civil-regulatory, the State can regulate the**
23 **sale of fireworks under its inherent authority.**

1 Washington fireworks laws are criminal/prohibitory for purposes of
2 Public Law 83-280 and RCW 37.12. But even if they were civil/regulatory,
3 that would not foreclose state authority to regulate Yakama Indians who sell
4 dangerous fireworks to non-Indians from off-reservation Yakama trust
5 allotments in Klickitat County. Public Law 280 is not the only source of state
6 authority in Indian country, and it says nothing about enforcement of state
7 civil/regulatory laws. *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317,
8 325 (2017).

10 Regardless of whether Public Law 280 applies, when “state interests
11 outside the reservation are implicated, States may regulate the activities even
12 of tribe members on tribal land.” *Nevada v. Hicks*, 533 U.S. 353, 362 (2001);
13 *see Cabazon*, 489 U.S. at 215 (“in exceptional circumstances a State may
14 assert jurisdiction over the on-reservation activities of tribal members”)
15 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32
16 (1983)); *State v. Jones*, 729 N.W.2d 1, 12-15 (Minn. 2007) (Anderson, J.,
17 concurring; “exceptional circumstances” permitted enforcement of state
18 predatory-offender registration statute).

21 The State’s interest will be particularly substantial if the conduct it
22 seeks to regulate will have a significant impact outside Indian country. *See*
23 *Hicks*, 533 U.S. at 362; *Cabazon*, 489 U.S. at 215-16; *Mescalero Apache*, 462

1 U.S. at 336. For example, Washington may require Yakama members to
2 collect and remit state cigarette taxes from non-Indian customers who travel to
3 the reservation to purchase cigarettes from tribal smokeshops. *Washington v.*
4 *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159
5 (1980); *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680
6 F. Supp. 2d 1258 (E.D. Wash. 2010), *aff'd*, 658 F.3d 1078 (9th Cir. 2011).

8 In this case, it is undisputed that illegal fireworks, such as those sold to
9 non-Yakamas from off-reservation Yakama trust allotments in Klickitat
10 County, have a significant public safety impact outside Indian country. *See*
11 Declaration of Klickitat County Sheriff Bob Songer in Opposition to
12 Plaintiff's Motion for Summary Judgment, filed on the same day as this
13 Response. The Yakama Nation's own code recognizes that certain types of
14 fireworks sold under Yakama Nation permit are "dangerous." Revised
15 Yakama Nation Law & Order Code § 50.54.01 (2009). Some of these
16 "dangerous" fireworks are so dangerous that their sale is prohibited under
17 state law. RCW 70.77.401. The off-reservation allotments from which these
18 dangerous materials are sold are in places such as the towns of Bingen and
19 White Salmon, in the Columbia River Gorge. ECF No. 21-3 at 16, 21. As
20 described in the previously-filed Declaration of Klickitat County Sheriff Bob
21 Songer (ECF No. 8-1), wildfires caused by illegal fireworks have caused
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1 significant damage to natural resources and state infrastructure in the
2 Columbia River Gorge near Klickitat County. The sale and distribution of
3 state-prohibited fireworks from off-reservation trust allotments in Klickitat
4 County endangers the lives of people and wildlife in Klickitat County – the
5 grave implications of illegal use of fireworks have already been seen in the
6 region. *Id.* ¶ 9. If the State can require Yakama smokeshops within the
7 Yakama Reservation to collect and remit state cigarette taxes on sales to non-
8 Yakamas, surely it can protect everyone in Klickitat County by requiring
9 Yakama fireworks stands on off-reservation Yakama trust allotments to
10 comply with state fireworks laws. These laws include the right to limit the
11 time in which the fireworks are sold and used and the type of fireworks
12 marketed.
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14

15 Plaintiff asserts that it regulates its members' sale of fireworks on off-
16 reservation trust allotments, ECF No. 1 ¶ 5.4, but it provides no evidence
17 about any such regulations. Plaintiff's evidence does show that its Department
18 of Revenue issues permits for the operation of fireworks stands and collects a
19 \$200 fee from applicants. ECF No. 21-2. The application forms request
20 permission to sell "Class C" fireworks, but Plaintiff has not explained what
21 those are. ECF No. 21-2 at 6, 8, 10, 12, 14. The application forms and permits
22 state that the applicant's business is subject to Yakama Nation Law & Order
23

1 Code §50.53, Law & Order Committee Actions 93-2016-9 and 069-2015, and
2 Tribal Council Resolution T-118-94, but Plaintiff has not provided copies of
3 any of these documents to the court. ECF No. 21-2 at 5-14. The publicly
4 available 2009 version of Yakama Nation Law & Order Code chapter 50.53 is
5 entitled “State Fireworks Law,” and it contains one section, 50.53.01,
6 regarding removal of vehicles unlawfully used to transport or store fireworks.
7 The permits also state that the permittee has completed mandatory safety
8 training, but Plaintiff has provided no evidence of what that is. ECF No. 21-2
9 at 5, 7, 9, 11, 13. Plaintiff’s evidence does not demonstrate that public safety
10 will be protected without enforcement of state fireworks laws.
11

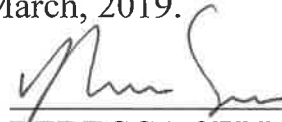
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13 Federal interests are consistent with those of the state. Illegal fireworks
14 have damaged federal land in Klickitat County. Decl. Songer Opp’n Pl.’s Mot.
15 Summ. J. ¶ 10. Federal regulations governing Yakama members’ use of
16 Columbia River Treaty Fishing Access Sites in Klickitat County prohibit all
17 fireworks sales at the sites. 25 C.F.R. § 247.19(b).
18

19 III. CONCLUSION

20 Defendants respectfully requests that the Court deny Plaintiff’s Motion
21 for Summary Judgment as the Plaintiff is not entitled to judgment as a matter
22 of law. Defendant respectfully requests that the Court grant summary
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1 judgment to the Defendants based on the foregoing arguments, pursuant to
2 Fed. R. Civ. P. 56(f).

3 DATED this 25th day of March, 2019.

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5 REBECCA SELLS, WSBA#48192
6 Klickitat County Deputy Prosecuting
7 Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which automatically generated a Notice of Electronic Filing ("NEF") to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. All parties are registered users of the CM/ECF system.

DATED this 25th day of March, 2019.



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